Supreme Court, U.S.
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No. 02-348

In the Supreme Court of the United States

OCTOBER TERM, 2002

Marsha Seiber and Alvin Seiber,

Petitioners,

v.

State of Oregon, by and through the Oregon State Board of Forestry,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED

Whether petitioners state a claim for a physical taking by alleging that the state denied approval of their written plan to harvest 40 acres of merchantable timber on their 200-acre property in order to protect the nesting site of a northern spotted owl near the property.

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STATEMENT OF THE CASE

The Oregon Board of Forestry has a rule that restricts timber harvesting in certain circumstances. The board applied that rule to deny approval to petitioners' plan to harvest 40 acres of timber on 200 acres of land petitioners own and live on. Petitioners filed a taking claim, asserting that the plan denial worked a regulatory taking. They also asserted that, because a purpose of the regulation was to protect endangered owls nesting on the property, the government had physically taken their property.

The trial court dismissed the physical taking claim on the merits with prejudice. The court also dismissed the regulatory taking claim because it was not yet ripe. While petitioners' appeal of the dismissal of their physical taking claim was pending, petitioners ripened their regulatory taking claim and re-filed it in state court. (App A). The owls abandoned their nest site, on a nearby property, and "the State Forester on August 3, 2001 informed plaintiffs that he had declared the nesting site to have been abandoned and, therefore, the defendant withdrew its objections to their harvesting the Subject Timber." (App A, App-4). Petitioners are now proceeding with a temporary regulatory taking claim in Oregon circuit court with a trial scheduled to begin March 3, 2003. (App A, App B)

Oregon's intermediate appellate court affirmed the dismissal of the physical taking claim without an opinion, relying on its previous opinion in *Boise Cascade Corp. v. Bd. of Forestry*, 164 Or. App. 114, 991 P.2d 563 (1999), *rev. den.* 331 Or. 244 (2000), *cert. denied* 532 U.S. 923 (2001). The Oregon Supreme Court also denied review. Petitioners now ask this Court to consider that claim.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The petition overstates the effect of the challenged regulation

This case is about a temporary restriction on one specific land use proposal, to harvest approximately 40 acres of timber. Petitioners attempt to obscure the regulatory nature of the government action by exaggerating how it affects their property. Their assertion that the state has "prevented Petitioners from taking any action to exclude the owls, either by harvesting their habitat or causing them to 'flush from the nest site'" is inaccurate. (Pet 10). (*See also* Pet 11) ("regulation prohibits petitioner from conducting any activity on the property that could 'cause the owls to flush from the nesting site.'"). The only action the state has taken, and the stated basis for petitioners' taking claim, is "denial of their plan to log the subject timber." (Pet, App L, 36a). The state took that action under a regulation that requires a timber operator to obtain approval of a written operations plan for proposed harvesting activities that "will conflict with protection of a nesting site of the northern spotted owl." Or. Admin. R. 629-665-0210(1) (Pet, App G, 22a). When petitioners submitted a plan that did not meet the standards for approval, the state denied the plan.

The state has not done anything else to interfere with petitioner's ability to exclude owls from the property. As far as the challenged regulation is concerned, petitioners are free to erect fences, construct scarecrows, install sound devices, or take any other lawful action, unconnected to timber harvesting, to discourage owls from entering their property. And the only limitation the state has imposed on petitioners' ability to

cause owls to flush from the nesting site is in their conduct of timber harvesting operations.

Petitioners likewise exaggerate when they claim that the regulation requires them to "leave their land in its natural condition so that it can be occupied as wildlife habitat," thereby imposing "a wildlife servitude." (Pet 9). (*See also* Pet 15) (asserting that regulation requires that they leave their property "in its natural state"). The sole regulatory restriction imposed on the property was the denial of a particular plan for harvesting 40 acres of timber. Petitioners have not been prevented from making any other use of their property. They live on the property, and have harvested 15 acres of timber from their property, and plan to log another 25 acres. *Seiber v. U.S.*, 53 Fed. Cl. 570, 579 (2002). They are free to go onto the property and invite others to do so. And they can sell the property. Now that the owls have left the nest tree, they are also free to log the 40 acres they claim the government has taken.

Petitioners likewise overstate the case when they assert that the "regulation goes beyond merely regulating the use of Petitioner's land; it requires that the timber on it be left standing for the sole purpose of providing spotted owl habitat." (Pet 11). That is not true. The state's denial of approval of a particular timber harvesting plan imposed no affirmative obligation on petitioners. It simply regulated when and where they could engage in one type of activity, timber harvesting. For the same reasons, petitioners are also wrong in claiming that the harvesting prohibition "imposes a wildlife servitude

upon Petitioners' timber," and requires them to "set aside timber to provide nesting habitat for spotted owls." (Pet 12).[1]

Petitioners also claim that they "cannot harvest 40 acres of trees that have taken them decades to grow and on which they depend for income during their retirement years." (Pet 11). That argument is no longer true now that the owls have abandoned the nest site near the property. (App A, App-4). And in any event, the argument does not explain why the regulatory restriction should be analyzed as a physical occupation of property, rather than a regulation.

Even petitioners' claim that the owls have physically occupied their property is overstated. Petitioners' complaint in this case alleges a physical taking of a 40-acre area they claim they cannot harvest. (Pet, App L, 32a). Based on that allegation, one might infer that the owls had physically occupied the 40-acre area. But that is not the case. The owls were not occupying petitioners' property at all. Even the owls' nest tree was not on petitioners' property, but "in timber on land immediately to the north of" the property. (App A, App-3).

Thus, this is not a case where the state has taken possession of petitioners' property or forced them to admit wildlife onto the property, or prevented them from doing anything besides undertaking one type of use, the proposed timber harvest. And the state's actions to protect a nesting tree near petitioners' property have not "forced" petitioners to allow owls to occupy their property. This is simply a case where the state temporarily prevented petitioners from cutting down trees on

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[1] Petitioners also assert that "much of the subject timber has blown down" since 1998 and "the wood is no longer of merchantable quality." (Pet 14). The record contains no evidence to support that assertion, and the state does not believe it is accurate.

one portion of their property to avoid harm to owls nesting nearby. That is, the state has prevented petitioners from engaging in a particular activity on a portion of their property, as land use regulations do all the time.

Petitioners' argument that the regulatory restriction in this case should be analyzed as a physical taking instead of a regulatory taking is based solely on the *reason* the state has imposed the use restriction, without considering the functional consequence of the regulation itself. Petitioners argue that, because the purpose of the restriction was to avoid harm to owls nesting in trees near the property, a court should treat their claim as a per se physical taking, without examining the various factors that a court must consider in resolving a regulatory taking claim. But this Court's cases have always—necessarily—focused on consequences in assessing whether there has been a physical taking. For example, a restriction on timber harvesting in order to control erosion would have the same consequence as an identical restriction to prevent harm to wildlife. Yet no one would seriously contend that a restriction to control erosion should be treated as a physical taking; there is no reason to treat the same restriction, imposed for a different purpose, differently.

II. This case presents the same legal question this Court considered when it denied certiorari in *Boise*.

This Court previously denied certiorari in *Boise Cascade Corp. v. Bd. of Forestry,* 164 Or App 114. That decision held that the trial court had erred in not striking a claim that "denial of plaintiff's plan to harvest timber" under the regulation at issue in this case "constituted a *per se* taking" under *Loretto* [*v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982)]. *Boise,* 164 Or. App. at 125.

Petitioners now ask this Court to consider precisely the same legal question raised in the earlier petition and to review an unpublished trial court decision that relied on *Boise*. Petitioners have not shown how the unpublished trial court decision is likely to have any precedential value, or how any decisions since the Court denied certiorari in *Boise* conflict with that decision. A recent decision by the Federal Circuit Court of Appeals considering a harvest prohibition identical to the one in this case, cited, discussed, relied on and followed *Boise*. *Boise Cascade Corp. v. U.S.*, 296 F.3d 1339 (Fed. Cir. 2002). A trial court within the Federal Circuit considering the same prohibition, as applied to petitioners' property, followed the Federal Circuit decision and reached the same result. *Seiber v. U.S.*, 53 Fed. Cl. 570.

III. There is no conflict with other decisions.

Petitioners claim that two subsequent decisions conflict with *Boise*. That argument in support of certiorari is not persuasive. One of those decisions was by a trial court within the Federal Circuit, reached before the Federal Circuit's *Boise* decison. *Tulare Lake Basin Water Storage District v. U.S.*, 49 Fed. Cl. 313 (2001). This Court should allow the Federal Circuit to determine, in the first instance, whether *Tulare Lake* conflicts with the Federal Circuit *Boise* decision.

Petitioners also argue that this Court's recent decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. __, 122 S. Ct. 1465 (2002) is inconsistent with the Oregon *Boise* decision. That argument is mistaken. *Tahoe* explained that physical taking doctrine applies to action that "gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property,

nor does it dispossess the owner or affect her right to exclude others." *Tahoe,* 122 S Ct 1479-1480 n 19. This case involves a temporary restriction on timber harvesting. The state did not directly use the property or dispossess petitioners or affect their right to admit or exclude anyone from the property. Thus, *Tahoe* supports the conclusion the trial court reached in this case, that the government action should be analyzed as a regulatory, not a physical taking claim.

Petitioners point to other decisions that supposedly conflicted with *Boise* when it was decided. But all of those decisions are at least 40 years old or found no taking.[2] In sum, *Boise* does not conflict with this Court's physical taking jurisprudence, and there is no split of authority among lower courts that merits this Court's attention.

IV. The regulatory restriction in this case did not interfere with property rights seriously enough to come under the *Loretto* rule.

Respondents recognize that there may be circumstances where a property use regulation could be so intrusive it could amount to a physical taking. *Loretto* described the type of interference that might meet that test. "Property rights in a physical thing" consist of the rights to possess, use, and dispose of it, and a permanent physical occupation "effectively

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2 Petitioners acknowledge that the only post *Loretto* cases they cite in this regard, *Moerman v. State,* 21 Cal. Rptr.2d 329, 333-334 (Cal. Ct. App. 1993) and *Southview Associates, Ltd. v. Bongartz,* 980 F.2d 84, 95 (2d Cir. 1992) each found no taking. One of the older cases petitioners cite, *Bailey v. Holland,* 126 F.2d 317 (4th Cir. 1942), reversed a lower court decision enjoining enforcement of the challenged regulation. The other two cited cases are both more than 40 years old, and, because they pre-dated *Loretto* by two decades, did not purport to construe or apply it. *State v. Herwig,* 117 N.W. 2d 535 (Wis. 1962); *Shellnut v. Ark. State Game & Fish Comm'n,*, 258 S.W.2d 570 (Ark 1953).

destroys *each* of these rights." *Loretto,* 458 US at 435 (emphasis in original). "First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Id.* "Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property." *Id.* at 436. "Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will be unable to make any use of the property." *Id.* In sum, the government's actions enable the invader to "exercise complete dominion" over the owner's property. *Id.* at 441.

Nothing approaching the level of interference described in *Loretto* has occurred here. Neither the state, nor the owls, has ever exercised anything like "complete dominion" over the property. The state has not – temporarily, much less permanently – effectively destroyed petitioners' rights to possess, use, or dispose of the property. The state did not obtain an interest in the property, or take possession, or dispossess petitioners. It did not admit or exclude – or prevent petitioners from excluding – any persons or the public generally. Except for the specific denial of a particular harvest plan, petitioners have retained full control over the property's use. And petitioners cannot show that the property was emptied of value, or that they could not have conveyed their rights over the use and disposition of the property to a prospective purchaser. In sum, the temporary use restriction was neither qualitatively nor quantitatively severe enough to come within the *Loretto* rule.

Loretto recognized "a State's broad power to impose appropriate restrictions upon a property owner's *use* of his property" without compensation. *Loretto*, 458 US at 441 (emphasis in original). And this Court has repeatedly declined to apply *Loretto* to actions regulating how property can be used. E.g. *Yee v. City of Escondido,* 503 U.S. 519, 537-539 (1992); *FCC v. Florida Power Corp.,* 480 U.S. 245, 251 (1987). *See also U.S. v. Sperry*, 493 U.S. 52, 62 n 9 (1989) (rejecting "extravagant extension of *Loretto*"). The *Loretto* rule, by its terms, is "very narrow," *Loretto,* 458 US at 441, and does not extend to the use restriction in this case.

Finally, *amici* claim that there is a conflict between *Boise* and lower court decisions recognizing that placement of utility attachments on private property comes within the *Loretto* rule. (Am Br 9-14). *Loretto* comprehensively inventoried government liability for physical invasions without discussing or citing any cases recognizing categorical liability for an invasion not caused or carried out by a person. *Loretto*, 458 US at 427-31. The Court specifically mentioned bridges, railroad and streetcar lines, telephone and telegraph lines, underground pipes or wires, gas, water, or sewer lines, and floods caused by dam construction as invasions that could give rise to takings liability. *Id.* The Court has also recognized that a property owner may be entitled to compensation for loss of the right to exclude when the government authorizes the public to enter or cross private property, effectively acquiring a public easement. *Dolan v. City of Tigard,* 512 U.S. 374 (1994). *Nollan v. California Coastal Comm'n,* 483 US 825 (1987); *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979).

Those cases all involved purposeful human action leading directly to an occupation. In each case, government action allowed humans to enter, or place objects, or deposit flood-

water on property without the owner's consent. And in each case, without the government authorization, the owner would have had some legal remedy for the invasion: for example in a trespass action. The utility placement cases the *amici* cite fall within that rule. But petitioners and *amici* cite no modern case where a court has treated a regulatory action to protect an owl's nest in a tree near, but not on, a claimant's property as an occupation of that property for purposes of *Loretto*.

CONCLUSION

If petitioners wish to obtain categorical treatment for their challenge to a government regulation, they must do so in a regulatory context, by showing that the regulation "denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1019, 1015 (1992). And that is precisely what they are trying to do in the taking action now pending in state court. (App A). But petitioners cannot show that this Court should grant certiorari to review the trial court's unpublished decision refusing to treat the timber harvesting prohibition in this case as a physical taking.

Respectfully submitted,

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November 27, 2002

APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF LINN

MARSHA SEIBER and ALVIN SEIBER, Plaintiffs, v. STATE OF OREGON, by and through THE OREGON STATE BOARD OF FORESTRY, Defendant.	No. 01-0333 SECOND AMENDED COMPLAINT (For Declaratory Relief and Inverse Condemnation Action for a Regulatory Taking of Private Property for a Public Purpose)

Plaintiffs allege as follows:

INTRODUCTION

1.

Plaintiffs Marsha Seiber and Alvin Seiber (the "Seibers") are the owners of approximately 200 acres of property (the "Property") located in Linn County, which plaintiff Marsha Seiber acquired through inheritance in 1986. About 185 to 190 acres of the Property are commercial timberlands.

2.

In August 1990, the Oregon State Forester (the "OSF") adopted an interim spotted owl policy precluding timer harvest within a 70-acre core area of the best available suitable habitat in the vicinity of the nest site. The Oregon State Board of Forestry (the "Board") subsequently adopted former OAR

629-024-0809 (present OAR 629-665-0210), which requires protection of a 70-acre core area of suitable northern spotted owl habitat encompassing the nest site. That provision states in part:

> "(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentialis caurina), the operator must obtain the state Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> "(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> "(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. * * *
>
> "(2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. * * *
>
> * * * * *
>
> "(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal

authorities under the federal Endangered Species Act." OAR 629-665-0210.

FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

3.

Timber of the kind found on the Property is considered by defendant to be suitable nesting habitat for spotted owls. In 1994, the OSF informed plaintiffs that in April of that year a pair of northern spotted owls ("Little Wiley Owls") was discovered nesting in timber on land immediately to the north of the Property. The OSF then designated approximately 40 acres (the "Subject Timber") of the Property as northern spotted owl nesting habitat pursuant to OAR 629-665-0210 and informed plaintiffs they would not be allowed to log that area, so long as the activity site remained active under Oregon law.

4.

In 1997, plaintiffs were informed by the OSF that the owls had not nested adjacent land during that year. On February 4, 1998, plaintiffs filed Notification No. 98-791-40082 giving notice to the OSF of their desire to log the Subject Timber. In seeking to log the Subject Timber, plaintiffs indicated they were willing to not conduct logging operations while spotted owls might be nesting in the area (March 1 through September) or until the young spotted owls had fledged, to avoid any incidental harm to them. Even though the owls had not nested in the area during 1997, plaintiffs' plan to log the Subject Timber was denied approval on February 19, 1998 on the ground that it failed to describe how the operation would be conducted to provide a 70-acre core area of suitable spotted owl habitat consistent with the requirements of OAR 629-665-0210(1)(a).

5.

Plainfiffs then made a timely appeal of the OSF's denial of their plan to log the Subject Timber to the Board. On or about March 27, 1998, the Board entered a final order that affirmed the denial of plaintiffs' plan. The denial of plaintiffs' written plan by the Board was a final administrative action prohibiting plaintiffs from logging the Subject Timber.

6.

To obtain a waiver of 629-665-0210(1), pursuant to section (5) of that regulation, plaintiffs then submitted an application for an Incidental Take Permit ("ITP") to the U.S. Fish and Wildlife Service (the "USFWS"), after preparing a Habitat Conservation Plan ("HCP") as required by the federal Endangered Species Act ("ESA"). On November 9, 2000, the USFWS issued a Final Order, signed by the Regional Director denying plaintiffs an ITP for the Little Wiley Owls, even though they had not nested in the designated core area that includes the Subject Timber since 1996.

7.

After the USF&WS declined to issue plaintiffs an ITP, the State Forester on August 3, 2001 informed plaintiffs that he had declared the nesting site to have been abandoned and, therefore, the defendant withdrew its objections to their harvesting the Subject Timber.

CLAIM ONE
(Declaratory Relief--Facial Challenge to OAR 629-665-0210)

8.

Plaintiffs reallege paragraphs 1 through 7 above.

9.

Plaintiffs seek a declaratory judgment pursuant to ORS 28.010, et seq., that OAR 629-665-0210 effects a taking of plaintiffs' property for a public purpose under the Fifth Amendment to the U.S. Constitution. Timber owners who are not permitted to log their timber on account of that rule are required to submit to a physical occupation of that property for use as a spotted owl nesting site; at that same time, they are denied all economic productive use of timber that cannot be logged on account of being preserved as a nesting site. The Board lacks the power of eminent domain authority to obtain a "conservation easement" for the purpose of obtaining property to be maintained as suitable spotted owl habitat; therefore, it did not have the authority to promulgate OAR 629-665-0210 which imposes a wildlife servitude for that purpose. GTE Northwest, Inc. v. Public Utility Commission, 321 Or 458, 900 P2d 495 (1995).

CLAIM TWO
(Oregon Constitution)

10.

Plaintiffs reallege paragraphs 1 through 7 above.

11.

From April 1994 until August 2001 the 40 acres of Subject Timber that plaintiffs has been prohibited from logging contain approximately 800,000 board feet of merchantable timber, much of which was infested with root rot that caused many of the trees to fall down and to no longer be of merchantable quality. The market price of the merchantable timber also declined significantly from 1994 to 2001. As a result of not being able to harvest their timber during that period plaintiffs have suffered a loss of $467,462.00.

12.

The Board's denial of plaintiff's plan to log the Subject Timber to preserve it as a spotted owl nest site and core area habitat constituted a taking of plaintiffs' property for a public purpose, which requires defendant to pay plaintiffs just compensation for the subject timber pursuant to Article 1, section 18, of the Oregon Constitution.

13.

The Subject Timber that plaintiffs desire to log has no economic value unless harvested.

14.

The Board's action in denying plaintiffs the right to log the Subject Timber has denied plaintiffs of economically productive use of that property interest.

15.

Plaintiffs are entitled to interest at the rate of 9 percent from August 3, 2001, and their reasonable attorney fees, pursuant to ORS 20.085.

CLAIM THREE
COUNT ONE

(Lucas Per Se Claim--U.S. Constitution)

16.

Plaintiffs reallege paragraphs 1 through 7, 11, 13, and 14 above.

17.

The Board's action in denying plaintiffs the right to log their property deprived plaintiffs of all economically productive use of their merchantable timber and constituted a taking of plaintiffs' property for a public purpose, which requires

defendant to pay plaintiffs just compensation of their property under the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

CLAIM THREE
COUNT TWO

(Agins Claim--U.S. Constitution)

18.

Plaintiffs reallege paragraphs 1 through 7, 11 and 13 above.

19.

In 1987 the Oregon legislature enacted a state Endangered Species Act. ORS 496.192(1), which is a part of that act, states that it is was not intended

> "to require an owner of any commercial forestland or other private land to take action to protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land."

20.

That same session of the legislature also adopted ORS 527.630(1), which provides, in part, that "it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that ensure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land. * * *"

21.

Defendant took no action to adopt what is now OAR 629-665-0210 or otherwise protect northern spotted owl habitat on private lands until the bird was declared a threatened species

under the federal ESA in July 1990. OAR 629-665-0120 was adopted as a result of the USFWS adopting guidelines requiring the protection of a minimum of 70 acres of habitat around every northern spotted owl nest site.

22.

However, when the USFWS was required to designate critical habitat for the recovery of the species, it only designated lands owned by the federal government as critical habitat for the northern spotted owl. Further, the USFWS rescinded its 70-acre guideline as applying to private property after a federal court found that it had not been adopted according to law.

23.

OAR 629-665-0210 does not substantially advance a legitimate state interest because it singles out only some timber owners to bear the burden of providing nesting habitat for the spotted owl, while other timber owners in the same area are free to harvest their timber. Therefore, enforcement of OAR 629-665-0210 constitutes a taking of private property for a public purpose in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution.

CLAIM THREE
COUNT THREE

(Penn Central-U.S. Constitution)

24.

Plaintiffs reallege paragraphs 1 through 7, 11, 13, 19, 21 and 22 above.

25.

Pursuant to Oregon law, plaintiffs acquired and have managed their timberlands with the investment backed expectation that they could use them for the continuous growing

and harvesting of forest tree species, in order to provide income during their retirement. The application of OAR 629-665-0210 to forty acres of their property prevents them from managing their property in accordance with their investment backed expectations and prevents them from realizing income from the tree crop on those forty acres. Therefore, enforcement of OAR 629-665-0210 constitutes a taking of private property for a public purpose in violation of the taking Clause of the Fifth Amendment to the U.S. Constitution.

Wherefore, plaintiffs pray that:

A. OAR 629-665-0210 be declared invalid because it takes private property for a public purpose;

B. The Seibers be awarded the sum of $467,462.00, together with interest thereon at the rate of 9 percent per annum from August 3, 2001;

C. The court award plaintiffs their reasonable attorney fees and costs.

DATED: November 19, 2002.

s/Phillip D. Chadsey, OSB No. 66028

Attorneys for Plaintiffs
Trial Attorney: Phillip D. Chadsey

APPENDIX B

August 23, 2002

Phillip D. Chadsey, Esq
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Re: Seiber v. State of Oregon (Board of Forestry)
Linn County Case Number: 01-0333

Counsel:

During our pre trial conference today we agreed on the following:

1. The following parts of the amended complaint shall proceed to jury trial: Claim Two; Claim Three (Ct. 2); and Claim 3 (Ct.3).

2. Trial will begin on March 3, 2003 at 9:30 AM in Courtroom 1. Except for the morning of Thursday, March 6, the case will occupy the docket the remainder of that week.

3. Plaintiff will be allowed to depose a state employee concerning the methodology of and reasoning behind the setting of the boundaries in this case.

4. Neither party anticipates any further pre-trial motions.

5. The deadline for discovery shall be in 60 days: October 23, 2002. The court will not view favorably and may deny requests for discovery made after that date.

6. Plaintiff will initiate a conference call with the court at 8:30 AM on February 18, 2003 so that counsel and the court can confer one final time prior to trial to address any last minute details.

7. Counsel will submit proposed written jury instructions prior to trial. They are encouraged to do so by email. Please submit either a Word document or Word Perfect document, with file suffixes of either wpd. or doc.

Enclosed is this judicial district's policy on continuances. Absent very good cause no continuance will be allowed.

Sincerely yours,

s/Daniel R. Murphy
Daniel R. Murphy
Circuit Judge email: Daniel R. Murphy@ojd.state.or.us